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No. 06-173

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In The
Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

vs.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO, LLC; PHELPS DODGE CORPORATION; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

PHELPS DODGE CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Arizona Supreme Court correctly apply the doctrine of comity by refusing to consider the Tribe's argument that, as a result of alleged inadequate representation by the United States, the Tribe is not bound by the terms of a consent decree entered in 1935 settling all of the Tribe's claims to water from the Gila River, where the Tribe elected not to raise this argument with the United States District Court expressly retaining jurisdiction over the consent decree, and where this Court has repeatedly held that claim preclusion bars Indian tribes from relitigating water rights that have already been adjudicated on their behalf by the United States as trustee?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Phelps Dodge Corporation ("Phelps Dodge") incorporates by reference its Corporate Disclosure Statement set forth in Phelps Dodge's Conditional Cross-Petition for Writ of Certiorari, No. 06-333.

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STATEMENT OF THE CASE

Phelps Dodge incorporates the Statement of the Case set forth in Phelps Dodge's Conditional Cross-Petition for Writ of Certiorari, No. 06-333. In addition, Phelps Dodge makes the following statement.

1. The *Globe Equity* Litigation

In 1925, the United States on behalf of the San Carlos Apache Tribe (the "Tribe"), the Gila River Indian Community (the "Community"), and the San Carlos Irrigation Project ("SCIP") brought suit in the United States District Court for the District of Arizona to adjudicate the rights of the Tribe, the Community, and SCIP to the waters of the Gila River beginning ten miles east of the Arizona line to the confluence with the Salt River in *United States v. The Gila River Irrigation District, et al.*, Globe Equity 59 (the "*Globe Equity* Litigation"). After years of litigation, a settlement was reached and the *Globe Equity* Court entered a Decree on June 29, 1935 setting out the rights of the parties to the waters of the Gila River (the "Decree" or "*Globe Equity* Decree").[1]

The *Globe Equity* Court retained jurisdiction to enforce the rights granted under the Decree.[2] Indeed, the District Court and the Ninth Circuit have been called upon many times to interpret and enforce the Decree.[3]

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[1] The Decree is set forth in the Tribe's Supplemental Appendix at pp. 103-225.

[2] Article XIII of the Decree; Tribe's Supplemental Appendix at p. 225.

[3] *See, e.g., United States v. Gila Valley Irrigation Dist.*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irrigation Dist.*, 31 F.3d

(Continued on following page)

The Tribe and the Community were not parties in the original *Globe Equity* Litigation, but were represented by the United State as trustee. The Community first attempted to intervene in 1935. That request was denied. The Community was granted permission to intervene in the *Globe Equity* Litigation on May 2, 1983.[4] At that time, the District Court rejected any attempt by the Community to relitigate any issues relating to the Decree, including whether the representation of the Untied States was adequate: "It is too late in the day for GRIC now to complain of its representation back in 1935."[5] The Tribe was granted leave to intervene in the *Globe Equity* Litigation on July 10, 1990.[6] The Tribe specifically limited its intervention to enforcement of the Decree and did not seek to attack the representation of the United States.

2. The State Court *Gila River Adjudication*

In the mid-1970s, water rights claimants filed petitions to initiate general adjudications to determine and prioritize rights to water in the Gila River and its tributaries. *In Re The General Stream Adjudication of All Rights to Use Water in the Gila River System and Source*, W-1, W-2, W-3 and W-4 (consolidated) (the "*Gila River Adjudication*"). As

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1428 (9th Cir. 1994); *United States v. Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992); *United States v. Gila Valley Irrigation Dist.*, 959 F.2d 242 (9th Cir. 1992) (unpublished); *United States v. Gila Valley Irrigation Dist.*, 454 F.2d 219 (9th Cir. 1972); *Gila Valley Irrigation Dist. v. United States*, 118 F.2d 507 (9th Cir. 1941); *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444 (D. Ariz. 1996); *United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1 (D. Ariz. 1992).

[4] Appendix F to Tribe's Petition at pp. 212a-220a.

[5] *Id.* at p. 218a.

[6] Appendix O to Tribe's Petition at pp. 304a-306a.

part of the ongoing efforts to adjudicate the water rights of the parties, the Superior Court instituted contested action W1-206 to determine, among other things, the preclusive effect of the *Globe Equity* Decree upon the Tribe.

The Superior Court found that under the principals of claim preclusion, also known as *res judicata*, the Tribe was barred from asserting rights to additional water from the mainstream of the Gila River in excess of the water awarded to the Tribe in the *Globe Equity* Litigation. The court further held that the Tribe could seek water from the tributaries because those rights were not determined in the *Globe Equity* Litigation. The Tribe filed a petition for interlocutory review with the Supreme Court of Arizona. The Arizona Supreme Court accepted review and affirmed the Order of the Superior Court.[7] *In Re The General Adjudication of all Rights to Use Water in the Gila River System and Source,* 127 P.3d 882 (Ariz. 2006) ("*Gila VI*"). The Tribe's Petition arises from this decision.

3. The *San Carlos Apache Tribe v. Arizona* Litigation

In 1979, the Tribe brought suit in the United States District Court seeking to have its water rights adjudicated in that court, rather than in the *Gila River Adjudication*. The District Court stayed the action pending determination of the Tribe's water rights in the *Gila River Adjudication*. The Tribe appealed the decision to the Ninth Circuit which reversed the District Court. This Court accepted Arizona's Petition for Writ of Certiorari and reversed the Ninth Circuit. *Arizona v. San Carlos Apache Tribe of Arizona*, 643 U.S. 545 (1983) ("*San Carlos*"). This Court

[7] Appendix A to the Tribe's Petition at p. 1a.

held that the District Court properly stayed the District Court action.

The *San Carlos* litigation remains stayed pending resolution of the *Gila River Adjudication*. The Tribe has not sought to have the stay lifted nor followed the appellate process from any District Court decision. Although the *San Carlos* decision has nothing to do with the current issues on appeal, the Tribe nevertheless relies heavily upon that decision.

4. The Tribe Has More Water Than Those Water Rights Awarded in The *Globe Equity* Litigation

Throughout its Brief, the Tribe argues that it only has water to irrigate 1,000 acres of land given by the *Globe Equity* Decree. In fact, the geographic scope of the *Globe Equity* Litigation excluded the Salt River and its tributaries, including the Black River.[8] The Black River is the northern border of the San Carlos Apache Reservation. In 1992, Congress enacted the San Carlos Settlement Act of 1992. Pub. L. No. 102-575, 106 Stat. 4600, 4740-53, as amended. Under the Act and the Settlement, the Tribe was awarded 76,445 acre feet of water per year. The Tribe was also given, contrary to its assertion in its Petition, the ability to store water in the San Carlos Reservoir. The Tribe was given significant federal aid for capital projects on the Reservation, and given the rights to groundwater beneath the Reservation.

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[8] Appendix 2 to Phelps Dodge's Conditional Cross-Petition at ¶ 15.

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS TWICE REJECTED INDIAN TRIBES' ALLEGED CLAIMS OF INADEQUATE REPRESENTATION BY THE UNITED STATES IN WATER RIGHTS ADJUDICATIONS

In 1983, this Court decided two cases dealing with the application of claim preclusion on Indian tribes' water rights. *Nevada v. United States*, 463 U.S. 110 (1983); *Arizona v. California*, 640 U.S. 605 (1983) ("*Arizona II*"). In both cases, Indian tribes argued that the United States failed to obtain all of the implied reserved water rights to which the tribes were entitled. In both cases, the tribes argued that the United States failed to adequately represent the interests of the tribes; the tribes argued that, as a result, their claims to additional water rights should not be barred under the doctrine of claim preclusion. This Court rejected the arguments in both cases.

In *Nevada*, this Court held that the tribe was bound by the United States' representation: "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its Courts . . . these wards should themselves be permitted to relitigate the question." *Nevada*, 463 U.S. at 135 (quoting *Heckman v. United States*, 224 U.S. 413, 446 (1912)). The Court also rejected the tribe's argument, like the Tribe's argument here, that its due process rights were violated under *Hansberry v. Lee*, 311 U.S. 32 (1940). *Id.* at 135, n. 15. In distinguishing *Hansberry*, the Court held that "the Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest. When the Government performs such

duties it does not by that reason alone compromise its obligation to any of the interests involved." *Id.*

In *Arizona II*, the Court again rejected various tribes' arguments that a conflict of the United States' interests provided for a basis for the tribes to relitigate their water rights claims:

> We find no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the government's interest in serving water rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holdings in the West. *Colorado River Water Cons. District v. United States*, 424 U.S.[800,] 805 [(1976)]. The Government's representation of these varied interests does not deprive our decisions of finality.

Arizona II, 640 U.S. at 626-27.

Indeed, in both cases, this Court suggested that a tribe's remedy for alleged breach of the United States' duty to adequately represent the tribe was a suit by the tribe against the United States. *Id.* at 627, n. 20 ("If these cases are at all relevant, it is to suggest that in an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims."); *Nevada*, 463 U.S. at 135, n. 14 ("We, of course, do not pass judgment on the quality of representation that the Tribe received. In 1951 the Tribe sued the Government before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water for its fishery than it was entitled to.").

The Tribe, here, attempts to distinguish *Arizona II* because the Court found as a factual matter that the tribes failed to show inadequate representation. [Petition at 24.] Yet, the Tribe overlooks the undisputed facts in *Arizona II* that the United States failed to present evidence to secure substantial water rights for omitted lands. This Court found that the United States' undisputed failure to secure water rights for the omitted lands did not establish a breach of the United States' duty to adequately represent the tribes:

> A breach of the United States' duty to represent the Tribes' interest *is not demonstrated* merely *by showing that the government erred* in its calculation of irrigable acreage, *whether by oversight or,* as viewed in retrospect, *by an unnecessarily cautious litigation strategy.*

Arizona II, 640 U.S. at p. 628, n. 21 (emphasis added).

The Tribe attempts to distinguish *Nevada* because it argues adequacy of representation was not raised on appeal. On the contrary, this Court rejected the tribe's contention that under *Hansberry*, the United States had interests that impermissibly conflicted with the tribe's interests that would allow the tribe to relitigate its water rights claims. *Nevada,* 463 U.S. at 135, n. 15. This Court recognized that the United States failed to seek to establish a reserved water right for the tribe's fishery in Pyramid Lake and this failure did not amount to such a breach of the government's duty to adequately represent the tribe so as to allow relitigation of that water right in the subsequent proceeding: the District Court found that decisions made by the Interior Department exercising their congressionally delegated duties and responsibility "'resulted in the extinguishment of the alleged fishery purpose water rights . . .'"

Id. Nevertheless, this Court found that this "finding reflects the nature of a democratic government that is charged with more than one responsibility; it does not describe conduct that would deprive the United States of the authority to conduct litigation on behalf of diverse interests." *Id.*

In both cases, contrary to the argument of the Tribe, this Court rejected the tribes' attempts to relitigate water rights claims where the undisputed facts showed the United States failed to obtain significant water rights on behalf of tribes in the prior proceedings.

II. THE ARIZONA SUPREME COURT PROPERLY APPLIED THE PRINCIPLE OF COMITY

Although the Arizona Supreme Court recognized that this Court has consistently rejected arguments by Indian tribes that the United States has inadequately represented the tribes in prior proceedings, the Arizona Court refused to address the Tribe's inadequate representation claim under principles of comity. The Arizona Court found that the Tribe should have brought the issue to the attention of the District Court in the *Globe Equity* Litigation. *Gila VI*, 127 P.3d at 901.

The Arizona Supreme Court, relying upon the Restatement (Second) of Judgments § 78, found that "relief from a judgment 'must be obtained by means of a motion for that purpose in the court that rendered the judgment unless relief may be obtained more fully, conveniently, or appropriately by some other procedure.'" *Id.* at p. 898 ¶ 62. The Arizona Court recognized that the proper procedure would be a motion under Rule 60(b), *Federal Rules of Civil Procedure,* in the *Globe Equity* Court. The Arizona

Court also recognized that the Tribe could have sought to attack the United States' representation when it intervened in the *Globe Equity* Litigation in 1990, but chose not to do so:

> [The Tribe] could have sought to attack the Decree in its 1990 motion to intervene and then sought federal appellate review from any denial thereof. Had it done so, the federal courts could have conclusively addressed the issue. If we were today to consider the Tribe's privity arguments, we would be in effect rewarding its strategic choice to withhold making those arguments in the court that issued the Decree in order to seek a more favorable forum here. The doctrine of comity requires a different result. We therefore decline to consider the Tribe's attack on the Decree on the basis of absence of privity.

Id. at p. 901 ¶ 73 (footnotes omitted). The Tribe's entire Petition is based on its argument that this ruling conflicts with this Court's holding in *San Carlos*.

III. THE TRIBE'S RELIANCE ON THIS COURT'S DECISION IN *SAN CARLOS* IS MISPLACED

The gravamen of the Tribe's Petition is that "[u]nless reversed, the decision of the Arizona Supreme Court would send the Tribe back to federal court, and thereby 'work the very mischief that [this Court's] decision in *Colorado River* sought to avoid.'" [Petition at p. 16, quoting *San Carlos*, 643 U.S. at 855.] The Tribe's reliance on this Court's decision in *San Carlos* is misplaced.

The Arizona Supreme Court did not send the Tribe back to federal court in the *San Carlos* action, an action stayed pending resolution of the Tribe's water rights

claims in the *Gila River Adjudication*. Instead, the Arizona Supreme Court held that the Tribe's arguments regarding the United States' alleged inadequate representation should have been brought before the *Globe Equity* Court, the court with continuing jurisdiction over the *Globe Equity* Decree. The *San Carlos* decision in no way stands for the proposition that a challenge to the seventy-year-old consent Decree entered by the United States District Court that has expressly retained jurisdiction over the Decree must be raised, not in that District Court, but in the *Gila River Adjudication*.

The entire point the Tribe misses throughout its Petition is that the Tribe made a strategic decision not to raise its inadequate representation argument when it intervened in the *Globe Equity* Litigation in 1990. The Tribe could have done so but chose not to, presumably because the *Globe Equity* Court had rejected the Community's attempt to do so in 1983 when the Community intervened in the *Globe Equity* proceeding.[9] If the District Court then ruled against the Tribe, as it had done against the Community, the Tribe could have appealed from that ruling.

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[9] The Tribe, in footnote 19 of its Petition, describes how the Community's claims of inadequate representation were "completely different than" the Tribe's when the Community intervened in the *Globe Equity* Litigation. The Tribe explains how the Community sought to intervene in 1935 before the Decree was entered, how that motion was denied, and how the Community failed to appeal that decision in 1935. The Tribe argues that these facts guided the *Globe Equity* Court's decision in 1983. Yet even with these factual differences, the Tribe chose to forego its opportunity to make these arguments to the *Globe Equity* Court. When the Tribe decided in 1990 to intervene only as to the enforcement proceedings, it was the Tribe's strategic decision to not raise these issues with the *Globe Equity* Court.

Thus, the Tribe has not been "denied due process"[10] and Arizona has not "broken its promise." Instead the Tribe made a strategic decision to forego a direct attack on the United States' representation in the very case in which the Tribe alleges that representation was inadequate. The Tribe opted to take its chances on a collateral attack of the *Globe Equity* Decree in the state court general water adjudication.

IV. THE TRIBE'S ARGUMENT THAT THE *GILA RIVER ADJUDICATION* IS A BROKEN PROMISE IS IRRELEVANT AND WRONG

In the last section of its Petition, the Tribe argues that the *Gila River Adjudication* is not moving quickly enough to suit the Tribe. This argument is simply irrelevant to the preclusive effect of the *Globe Equity* Decree on the Tribe – the issue reviewed by the Arizona Supreme Court from which the Tribe brings its Petition. The rate at which the *Gila River Adjudication* has progressed has nothing to do with the issues raised by the Tribe.

Moreover, the Tribe is simply wrong that nothing has been accomplished. Many water rights claims by Indian tribes relating to Arizona waters have been settled:

Salt River Pima Reservation	Pub. L. No. 100-512, 102 Stat. 2549;

[10] The Tribe's argument that it has not had its day in court because the Arizona Supreme Court's decision violates the Tribe's due process is without merit. These same arguments were rejected by this Court in *Nevada* and *Arizona II*. *Nevada*, 463 U.S. at 135 and at n. 14; *Arizona II*, 640 U.S. at 626-27.

Fort McDowell Indian Reservation Pima	Pub. L. No. 101-628, 104 Stat. 4469, 4480-92;
Ak Chin Indian Reservation	Pub. L. No. 95-328, 92 Stat. 409;
San Carlos Apache Reservation to claims on the Salt River	Pub. L. No. 102-575, 106 Stat. 4600, 4740-53;
Gila River Indian Community	Pub. L. No. 108-451, 118 Stat. 3478; and
The Tohono O'odham Reservation	Pub. L. No. 99-469, 100 Stat. 1195.

Moreover, the Arizona Supreme Court has addressed many other overarching issues affecting the entire adjudication. *See, e.g., In Re The General Adjudication of All Rights to Use Water in The Gila River System and Source*, 35 P.3d 68 (Ariz. 2001) ("*Gila V*"); *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069 (Ariz. 2000) ("*Gila IV*"), cert. denied, 530 U.S. 1250 (2000); *In Re The General Adjudication of All Rights to Use Water in The Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) ("*Gila III*"); *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (Ariz. 1993) ("*Gila II*"); *In Re The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 830 P.2d 442 (Ariz. 1992) ("*Gila I*").

Finally, the fact that the legislature has failed to fund the Department of Water Resources at a level that the Tribe feels the legislature should have is a matter that the Tribe should take up with the legislature. It is not a sound basis for this Court to rely upon in reversing the Arizona Supreme Court's decision.

CONCLUSION

For the foregoing reasons, Phelps Dodge respectfully requests that the San Carlos Apache Tribe's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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